

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/04/2021 4:06:43 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD144/2021
File Title:	GUILD INSURANCE LIMITED ACN 004 538 863 v GYM FRANCHISES PTY LTD ACN 611 474 947 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 23/04/2021 4:06:48 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Concise Statement in Response

No. NSD144 of 2021

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations National Practice Area (Insurance List)

**Guild Insurance Limited (ACN 004 538 863)**

Applicant

**Gym Franchises Australia Pty Ltd (ACN 611 474 947) and another**

Respondents

### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

#### The Respondents' business and insurance policy

1. The first respondent (**Gym Franchises**) operates a gym known as "Reinvigr8 Health and Fitness", and the second respondent is one of the directors of Gym Franchises. The gym was originally located at 1 Brygon Creek Drive, Upper Coomera (**Coomera Premises**), and since April 2020, has been located at 34-38 Siganto Road, Helensvale (**Helensvale Premises**) (together, **Business Premises**). Gym Franchises offers members access to gym equipment, personal training, and group exercise classes. It operates on a 24-hour basis. Gym Franchises' operations had to be changed due to COVID-19.<sup>1</sup>
2. Subject to some matters of detail, there is no dispute as to the material terms of Gym Franchises' insurance policy (**Policy**) with the applicant (**Guild**).<sup>2</sup>

<sup>1</sup> Further particulars as to Gym Franchises' business and COVID-19's impact on it will be in the Outline Document to be served on the applicant pursuant to paragraph 3.a. of the Order dated 16 March 2021.

<sup>2</sup> The reference to "inability to trade or otherwise conduct the Business" ought be a reference to "inability to trade or otherwise conduct the Business in whole or in part during the Period of Cover" (cf the chapeau to [4]). The adjustment clause in the Policy is as follows: "an adjustment shall be made as may be necessary to reflect the trend in the Business and any other variations in the Business or other circumstances affecting the Business, either before or after the Damage occurring, or which would have affected the Business had the Damage not occurred in order that the figures thus adjusted represent as nearly as may be reasonably practicable the Income which would have been received during the relative period after the Damage occurred".

Filed on behalf of (name & role of party)	Gym Franchises Australia Pty Ltd and Douglas Reason, the Respondents
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## Authority response to COVID-19

3. From February 2020, Commonwealth and Queensland (and other state and territory) authorities made a number of orders which (from March 2020) had the effect of closing or evacuating (within the meaning of the Policy) Gym Franchises' business (**Authority Response-Gym Franchises**). The Authority Response-Gym Franchises includes what Guild describes as the "Queensland Government Measures", but is broader. The orders which Gym Franchises says comprise the Authority Response-Gym Franchises will be contained in the Agreed Facts.<sup>3</sup>

### Gym Franchises' claim

4. On or about 23 March 2020, Gym Franchises made a claim under the Policy (**Claim**). Gym Franchises claimed it was entitled to indemnity under the business interruption cover, because it had and would experience a loss of revenue for an undisclosed period due to the Authority Response-Gym Franchises. It stated, among other things, that this was due to the forced closure of Gym Franchises' premises.
5. Guild has denied Gym Franchises' claim.

### A preliminary matter (paragraph 10(a) of Guild's Concise Statement)

6. Gym Franchises did not assert in its claim that the Authority Response-Gym Franchises constituted the intervention of a lawful authority resulting from threat or damage to property in the immediate vicinity of the Business Premises which prevented access to or hindered the use of the Business Premises (paragraph (a) of the prevention of access clause). That issue was not before AFCA and, as such, is not a matter in dispute.

### Construction and response of the Policy

7. Gym Franchises claims that paragraph (c) of the prevention of access clause of the Policy (**POA Extension**) provides cover for the reasons set out below.
8. In the POA Extension, the word(s):
  - a. *"inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part"* include the policyholder's inability to generate income or otherwise carry on the whole or a part of the policyholder's business activities;
  - b. *"closure or evacuation of the whole or part of the Business Premises"* include not just physical closure or movement of persons from the Business Premises, but also restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or a part of the policyholder's business activities;
  - c. *"order of a competent government or statutory authority"* includes orders of the type involved in the Authority Response-Gym Franchises;

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<sup>3</sup> References to the Agreed Facts are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).

- d. *“human infectious or contagious diseases”* include COVID-19;
  - e. *“organism likely to result in human infectious or contagious disease”* include SARS-CoV-2; and
  - f. *“the discovery of an organism likely to result in ...”* mean the discovery of an organism in any location, where that organism is likely to result in human infectious or contagious disease at the Business Premises.
9. The POA Extension responds to Gym Franchises’ claim, and Gym Franchises is entitled to indemnity, because:
- a. there was an inability to trade or otherwise conduct the business at the Business Premises (in whole or part) because Gym Franchises had to comply with the Authority Response-Gym Franchises, including to close the gym;
  - b. there was closure or evacuation of the whole or part of the Business Premises by order of a competent government or statutory authority, because the Authority Response-Gym Franchises required closure of the Business Premises physically, as well as restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or a part of the policyholder’s business activities; and
  - c. that arose directly or indirectly from the discovery of SARS-CoV-2, which (due to its high transmissibility and rapid and wide spread across Queensland and the Gold Coast) was likely to result in human infectious or contagious disease (namely, COVID-19) at the Business Premises.

### **Trends and Adjustment Clause**

10. Contrary to paragraph 11 of Guild’s Concise Statement, Gym Franchises is entitled to complete indemnity. This is because:
- a. the loss was caused by one indivisible cause (being COVID-19, which comprises the COVID-19 pandemic, the Authority Response-Gym Franchises, and individual and public responses to COVID-19);
  - b. alternatively, the loss was caused by multiple effective concurrent causes;
  - c. in any case, Gym Franchises is entitled to complete indemnity where there are insured and uninsured (but not excluded) causes of loss; and
  - d. the counter-factual required under the adjustment clause ignores the insured peril and also trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic.

## **B. THE RELIEF SOUGHT FROM THE COURT**

11. Gym Franchises seeks:

- a. a declaration that Guild Insurance Limited is liable to indemnify Gym Franchises Australia Pty Ltd and Douglas Reason under the "Additional Benefits" (Prevention of Access) clause of the Fitness Centres Business Insurance policy P00226450;
- b. a declaration that the counter-factual required under the adjustment clause ignores the insured peril and trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic;
- c. a declaration that Gym Franchises Australia Pty Ltd is entitled to interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) on any amount for which Guild Insurance Limited is liable under the Fitness Centres Business Insurance policy P00226450 to pay Gym Franchises Australia Pty Ltd in respect of the claim, calculated from the date Guild Insurance Limited should reasonably have paid the claim in accordance with its contractual obligation to do so.

## **C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

12. The primary ground for the relief sought is section 21 of the *Federal Court of Australia Act 1976* (Cth).

## **D. THE ALLEGED HARM SUFFERED**

13. By reason of the interruption of or interference with its business, Gym Franchises has suffered loss. Particulars as to loss will be in the Outline Document.

### **Certificate of lawyer**

I, Christopher Michael Erfurt, certify to the Court that, in relation to the Concise Statement in Response filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for each allegation in the Response.

Date: 23 April 2021



Signed by Christopher Michael Erfurt

Lawyer for the Respondents